Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES

October Term, 1976

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W. DALTON LA RUE, SR., and
JUANITA S. LA RUE,

Petitioners,

vs. No. 76-53

UNITED STATES OF AMERICA, ROGERS C. B. MORTON, Secretary of Interior, E. I. ROWLAND, State Director of Bureau of Land Management, and MARSHALL MATLEY, CLIFFORD MATLEY, JOHN MATLEY and WAYNE MATLEY, d.b.a. M. S. LAND & LIVESTOCK CO., a Co-Partnership,

Respondents.

REPLY TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

* * * *

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REPLY TO PETITION FOR

WRIT OF CERTIORARI

As petitioners set forth, this is a petition for a review of a decision of the Ninth Circuit Court of Appeals affirming the District Court's Judgment granting respondents' motion for summary judgment and dismissing petitioners' action.

Petitioners have devoted most of their petition to the proposition that MARSHALL MATLEY, CLIFFORD MATLEY, JOHN MATLEY and WAYNE MATLEY, d.b.a. M & S LAND AND LIVESTOCK COMPANY, a co-partnership, hereinafter for the purpose of simplicity simply referred to as MATLEYS, perpetrated a fraud on a prior owner of property now owned by petitioners; and, by reason of this fraud, a stock fence dividing certain government land should be relocated.

The issue on the motion for summary

judgment before the District Court was not whether or not there was fraud perpetrated by MATLEYS on petitioners' predecessor; the issue was whether or not the Interior Board of Land Appeals, hereafter referred to as IBLA, in rendering its decision, committed any errors of law, acted arbitrarily or capriciously, or abused its discretion. The District Court held that the action taken by the IBLA constitutes agency action committed to agency discretion by law, there was no abuse of discretion by the IBLA, the agency did not act arbitrarily or capriciously, nor did the agency commit any errors of law. See the Findings of Fact and Conclusions of Law and Judgment at p. xxxvi of petitioners' Appendix.

Petitioners are requesting the Supreme Court, as they requested the Court of Appeals to do, and as they requested the District Court to do, to

substitute its judgment for that of the IBLA and, first of all, make a finding that there was fraud and, second, that by reason of the fraud, the fence in question in this matter ought to be moved.

Commencing at page 5 of petitioners' brief, are five reasons for granting the Writ of Certiorari. First, and probably of utmost importance, is that there is not one case cited upholding petitioners' argument that, under the facts of this case, the Writ should be granted. Petitioners' Nos. 1, 2 and 3 all, basically, are founded upon the so-called fraud issue. With respect to these contentions of fraud, the IBLA thoroughly considered the issue of fraud in light of the evidence it had before it, and concluded as follows:

> "Nevertheless, the question of fraud is not of controlling importance in this case. First, a federal grazing licensee has no right to any particular area of the federal range, 48 Stat. 1269 (1934) as amended, 43 U.S.C. §§ 315, 315(a)-315(r) (1970);

> George C. West, A28862 (August 10, 1962). Also, as is pointed out by the government, a licensee's only reasonable basis for challenging his grazing allotment is to show the allotment to be incapable of satisfying the allottee's authorized grazing demand. . . .
>
> "The issue in this case is not how the fence came to be, but whether it should remain. The scope of examination to resolve this issue is limited to two questions. First, does the fence line serve as an appropriate boundary for the two allotments, affording each of the allottees full satisfaction of their base property qualifications? Second, does the location of the fence violate the tenets of proper range management to such a degree that relocation is required as a remedy? The preponderance of the evidence answers the first question in the affirmative, the second in the negative.
>
> "This department is seriously concerned by allegations of fraud associated with its apportionment of federal range land. Were it possible to conclude from the evidence in this case that a fraud had been perpetrated and, in consequence the appellants had been deprived of a privilege to which they are entitled, this Board would act to set matters aright. But where it is established that the line is located so as to give both parties full satisfaction of their respective allotments, as is the case here, the impetus for its location is not germane to the ques-

> tion of whether it should be moved. In short, we will not destroy an equitable and just apportionment of federal range in favor of some less desirable division simply because of the dubious origins of the present line." P. xxxiii, et al, of petitioners' Appendix.

From the foregoing, the District Court concluded that petitioners' main issue had been completely and properly considered and resolved by the IBLA, and therefore dismissed petitioners' action.

With respect to petitioners' No. 4, petitioners' position is set forth at page 40 of their brief, and is as follows:

> "A licensee must know what he owns and what are his rights when he is adjudicated a specific grazing allotment, as Appellants were in the present case."

The law is clear that the petitioners do not have a property right, as they think they do, to grazing land. A grazing permit does not create a property right, it confers no more than a mere privilege to graze livestock, which can be withdrawn by the United States without payment or

compensation. Bowman v. Udall, (D.C. D.C. 1965) 243 F.Supp. 672, affirmed 364 F2d 676, 124 U.S. App.D.C. 283; Acton v. U.S., (C.A. Ariz. 1968) 401 F.2d 896, certiorari denied 89 S.Ct. 1003, 393 U.S. 1121, 22 L.Ed.2d 128.

No. 5 of petitioners' brief is not directed at intervenors and no response will be made.

There is substantial law respecting the issues involved in this case. In Henrikson v. Udall, 350 F.2d 949-50 (9th Cir. 1965), the Court held:

> "It is the function of neither this Court nor of the District Court, in a proceeding such as this, to weigh the evidence adduced in the administrative proceeding. Rather, if upon review of the entire record of that proceeding there is found substantial evidence to support the Secretary's decision, that decision must be affirmed." (Underscoring added.)

The Court held in Dredge Corporation v. Penny, 338 F.2d 456, 462 (9th Cir. 1964):

> "In such a proceeding the plaintiff

> is not entitled to a de novo hearing in the district court. (Citation omitted.) The only function the district court has with regard to the facts in such a procedure, if the question is raised, is to determine whether the administrative findings of fact are supported by substantial evidence on the record as a whole."

There are numerous other cases at 5 U.S.C.A. § 706 n.155-160.

Respondents, at the risk of being redundant, again point out to the Court that the only dispute the petitioners have is with the conclusion reached by the IBLA. Petitioners believe the IBLA should have found fraud on the part of respondents MATLEYS, and by reason of this fraud, the fence in question ought to be moved. As is set forth above, the IBLA considered the fraud issue and found there was none, but it even went further and held even if there were a fraud, that would not be sufficient reason to move the fence. Under these facts the petitioners received their limited right of judicial

review, and upon such review, based upon the record, their action was dismissed.

As is set forth in Rule 19 of the Supreme Court Rules, "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

Thereafter the rule sets forth guidelines indicating the character of reasons which will be considered by the Court in granting a writ. Petitioners have not specifically claimed to fit in any of the categories set forth in the rule, and from a review of their brief, it is also impossible, even in a general way, to see where they come within any of the guidelines.

Numerous cases are cited in 28 U.S.C.A. § 1254. Respondents have not found any case for authority for granting petitioners' writ, and since petitioners cited

no authority, apparently they were unable to find any.

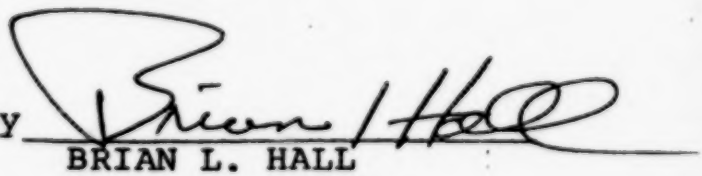
It is stated in 28 U.S.C.A. § 1254, Note 43, page 66, as follows:

> "Jurisdiction to review by certiorari should be sparingly exercised, and only in cases of peculiar gravity and general importance, or in cases affecting relations with foreign governments, or to secure uniformity of decisions." (Citing cases.)

In conclusion, it is respectfully submitted that petitioners have not met their burden respecting the granting of a Writ of Certiorari, and the Court should therefore deny the Writ.

DATED: August 9th, 1976.

BARRY & HALL

By 

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